IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-691

DANIEL C. FOSTER, et al., *Petitioners,*

v.

MARYLAND FEDERAL SAVINGS AND LOAN ASSOCIATION, *Respondent.*

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE CASE

Petitioners seek review of a decision, entered by the United States Court of Appeals for the District of Columbia Circuit on June 12, 1978, which is based on the reasons set forth in an Opinion [1] of the same date written by Circuit Judge Wilkey and concurred in by Circuit Judges Leventhal and MacKinnon. The peti-

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[1] The Opinion for the Court (hereinafter "Opinion") as well as a Concurring Opinion by Judge Leventhal are set forth in Appendix A to the petition. Footnote 25 of the Opinion was amended by the Court of Appeals on October 24, 1978 by an order which is set forth in the Appendix to this brief.

tioners' request for rehearing was denied *per curiam* on July 26, 1978. The Court of Appeals decision affirmed a directed verdict previously entered against petitioners by Judge William B. Bryant of the United States District Court for the District of Columbia.

INTRODUCTION

Respondent regrets the need for a detailed recital of the facts. Unfortunately, the petitioners' statement of the case so distorts the facts that the respondent is left with no alternative. Petitioners' purported description of the facts does not contain one single reference to the record and bears no resemblance to the evidence actually adduced at the trial. For example, petitioners' repeated references to "rebates" and "abusive" practices by lenders [2] are totally unsupported by the evidence and, in fact, petitioners' own evidence showed that there were no rebates here [3] and that the practice at issue was adopted to protect the lender's legitimate interests and benefited the borrowers as well as the lender.[4] In addition, in purporting to describe the pertinent facts, the petitioners have somehow failed to mention that the practice at issue was expressly authorized by federal regulation, and, despite the requirements of Rule 23.1(d), the applicable regulation is not even cited, much less quoted, in the petition.

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[2] The only "abusive practice" shown by the evidence concerned the practice followed by one of the petitioners' key witnesses, a lawyer, who had charged borrowers for performing services which were actually performed by the lender's counsel. I J.A. 177-85. ("I J.A." refers to Volume I of the Joint Appendix used in the Court of Appeals; Volume II will be cited as "II J.A.")

[3] II J.A. 329, 463.

[4] See pp. 5-6 *infra*.

STATEMENT OF FACTS

Respondent Maryland Federal Savings and Loan Association ("Maryland Federal") is a federally-insured mutual association having its principal place of business in Hyattsville, Maryland.[5] Petitioners represent a class of borrowers who obtained loans from Maryland Federal between January 1, 1971 and December 1975 and who paid a charge covering legal fees incurred by Maryland Federal in making the loans.

Petitioners' antitrust claims concern Maryland Federal's practice of having the law firm of Lancaster, Bland, Eisele & Harring [6] ("Lancaster, Bland") draft the mortgages or deeds of trust and analyze the title insurance binders and loan documents prepared by borrowers' counsel in connection with loans made by Maryland Federal. In accordance with section 563.35 [7] of the Federal Home Loan Bank Board regulations, the legal expenses incurred by Maryland Federal in connection with the loans are paid by the borrowers. This practice was adopted in January 1971.

Prior to January 1971, Maryland Federal had followed the practice of relying solely on the borrowers' counsel for the preparation of the loan instruments

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[5] At the time the suit was brought, Maryland Federal was a state-chartered association but it became a federal-chartered association on September 16, 1975. It has been federally-insured at all times pertinent to the litigation.

[6] For loans made in Charles County, Maryland, the services described are performed for Maryland Federal by Edward Digges, Esquire.

[7] The pertinent portion of the regulation which was in effect when this suit was brought is quoted in the Opinion at 10. The regulation was amended in August 1976, and the amended version of the regulation appears at 12 C.F.R. 563.35(d).

and title binder, and borrowers were permitted to use any member of the Maryland bar who had been given the highest rating (A-v-l-g) in the Martindale-Hubbell legal directory (II J.A. 332-335). This practice proved to be unsatisfactory for a number of reasons. First, many attorneys with the highest overall rating were found to be inexperienced and unqualified in the field of title examinations and real estate settlements (II J.A. 332; *see also* II J.A. 271). Secondly, some attorneys who specialized and were well-qualified in handling title examinations and real estate settlements were excluded from consideration under the practice (II J.A. 329-330; 334-335). Finally, many of the attorneys used were chosen not by the borrowers but rather by real estate developers or brokers, and those attorneys tended to be less concerned about the quality of the title being conveyed than with facilitating the sale.

For all of these reasons, Maryland Federal in 1971 decided to change its practice in two respects. It eliminated the requirement that the borrowers' counsel have the highest rating in Martindale-Hubbell since that requirement had proved ineffective (II J.A. 349-350). At the same time, as a more effective means of insuring that it had good security for its loans, Maryland Federal instituted the practice of requiring borrowers to reimburse it for the cost of retaining Lancaster, Bland in connection with each loan to analyze the title binder and loan documents prepared by the borrowers' counsel and to prepare the mortgage or deed of trust (II J.A. 315-318, 322). Of course, in those cases where the borrowers are represented by Lancaster, Bland no separate analysis is done, and no loan review charge is made, since it would be pointless and wasteful to have those lawyers review their own work.

Lancaster, Bland's fee for preparing a mortgage or deed of trust is $35 (II J.A. 353). The firm's fee for reviewing the title binders and other loan documents prepared by the borrowers' counsel is $65. Maryland Federal instructs the settlement attorney to collect those amounts at settlement and to forward the amounts to the association (II J.A. 317-318). Those amounts are then paid to Lancaster, Bland (II J.A. 329, 343-344), and Maryland Federal does not profit in any way from the amounts collected.[8]

Lancaster, Bland's services in analyzing the documents prepared by the borrowers' counsel are directed to determining whether there are any matters of record which would affect the validity or marketability of the title to the property on which Maryland Federal's loan would be secured. Lancaster, Bland also checks the house location survey to confirm that the building restriction lines have not been violated and to be certain that all easements and rights of way have been located so as to assure that there are no material encroachments. In addition, the legal description of the property is checked to confirm that it is complete and correct (II J.A. 351-352). Lancaster, Bland reports any deficiencies to Maryland Federal and advises the association on how the deficiencies should be corrected. In certain cases, the law firm may also advise the association not to make a loan where there is a title problem which would substantially affect the value of marketability of the property that would secure the loan (II J.A. 340-342).

The most crucial portion of Lancaster, Bland's analysis involves its examination of the exceptions listed

[8] II J.A. 329. *See also,* II J.A. 463.

in the title insurance binder. Those exceptions would not be covered by title insurance, and, hence, any problems concerning the exceptions could seriously jeopardize the security for the loan (II J.A. 270-271). Therefore, it is essential that the title binder exceptions be examined with particular care to determine whether there are any defects in title which could adversely affect the value of the property (I J.A. 209; II J.A. 271).

The testimony in this case amply demonstrated the need for careful examination of title binder exceptions.[9] The binder issued to one prospective borrower contained 14 separate exceptions, including a covenant prohibiting use of the property for any purpose other than operation of a sewage treatment plant (I J.A. 154-156). Another binder excepted from coverage a garage shown by the survey to encroach on adjacent property (I J.A. 149-152).

Lancaster, Bland's examination of the title binders and other loan documents protects Maryland Federal's interests because, as one of petitioners' expert admitted, many lawyers are inexpert in handling real estate transactions with the result that title may be left in a "sloppy state." (II J.A. 271-72.) The same expert also testified that title companies "do poor work for the most part." (II J.A. 273.) Indeed, the petitioners' own counsel conceded in pleadings filed in the district court

[9] In fact, the title binder issued to the Johnsons, two of the named plaintiffs, contained four separate exceptions including an easement which prohibited the erection of any structure within a forty-foot wide strip that ran across the property. Plaintiffs' title insurance expert conceded that if a house had been built within this forty-foot wide strip the holder of the easement could have demanded that the house be removed and any loss resulting therefrom would not have been covered by title insurance (I J.A. 138-39). See also I J.A. 139-44.

that "there may be settlement attorneys who are unqualified and perhaps some who fail even to live up to that low standard." [10]

ARGUMENT

Summary of Argument

Petitioners have deliberately misconstrued the Court of Appeals decision in an effort to create a reviewable issue where none exists. Petitioners contend that the decision requires proof of unlawful intent to establish a civil violation of section 1 of the Sherman Act. An examination of the decision shows that the Court of Appeals did not require proof of unlawful intent but instead considered intent as one of numerous "relevant facts" in evaluating an alleged restraint under the standard enunciated by this Court in *Chicago Board of Trade* v. *United States,* 246 U.S. 231, 238 (1918). Thus, the Court of Appeals' decision presents no issue for review, and certiorari should be denied.

Petitioners Have Misconstrued The Court Of Appeals' Decision In An Effort To Create A Reviewable Issue Where None Exists

Petitioners have formulated the question presented on the premise that the Court of Appeals required proof of "unlawful purpose" to establish a civil violation of section 1 of the Sherman Act. The petitioners' only effort to support that contention consists of an argument on pages 10 and 11 of the petition which is based on a one-sentence excerpt from the Opinion and on a four-paragraph excerpt from the Concurring Opinion. An examination of those excerpts will show that petitioners' contention is wholly unfounded.

[10] Points and authorities in support of plaintiffs' motion and application for class certification, 9.

The Court of Appeals did not hold that proof of unlawful intent was required; instead, it held that intent is one of numerous considerations which may be relevant in determining whether an unreasonable restraint is present. As Judge Leventhal points out in an amendment to the Concurring Opinion, this is "hardly new law" [11] because intent has been one of the relevant considerations in evaluating alleged restraints since at least 1918 when the Court decided *Chicago Board of Trade* v. *United States,* 246 U.S. 231. In that case, the Court stated:

> But the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. *The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.* [246 U.S. at 238; emphasis added.] [12]

[11] Modification of Concurring Opinion at 2.

[12] Nor have the relevant facts changed in the sixty years since *Chicago Board of Trade* was decided. In *United States* v. *United States Gypsum Co.,* —— U.S. —— (46 L.W. 4937, 4941 n.13), the Court stated that a civil violation can be established "by proof of either an unlawful purpose or an anticompetitive effect" and then goes on to state that: "Of course, considerations of intent may play an important role in divining the actual nature and effect of the alleged anticompetitive conduct." Petitioners cite *Gypsum* and set forth the first portion of the quotation but, unaccountably, fail to include last sentence quoted.

In examining the opinion excerpts upon which petitioners have relied, it becomes readily apparent that the Court of Appeals was not establishing any new test but rather was performing precisely the type of analysis required by *Chicago Board of Trade.* The excerpt which petitioners quoted from the Opinion reads as follows:

> The defendant's loan practice was instituted for a legitimate business purpose, and fully comports with plaintiffs' right to counsel and the defendant's statutory right to charge borrowers for incidental legal expenses.

Thus, the Court of Appeals was considering the "reason for adopting the particular remedy" and "the purpose or end sought to be attained" which are precisely the considerations that the Court in *Chicago Board of Trade* held are relevant in evaluating alleged restraints of trade.[13] Moreover, there is certainly not the slightest suggestion in the excerpt quoted that intent was the only consideration or that proof of unlawful intent was essential to establish a section 1 violation.

[13] In evaluating the alleged restraint, the Court of Appeals also considered each of the other factors mentioned by this Court in *Chicago Board of Trade* such as the "facts peculiar to the business" to which the alleged restraint was applied (*see* Opinion 4-5, 12-14), the "condition before and after the restraint was imposed" (*see* Opinion 10, 12), the "nature of the restraint and its effect, actual or probable" (*see* Opinion 10, 12-14). 246 U.S. at 238. On all counts, the Court of Appeals concluded that no "unreasonable restraint" had been shown.

Similarly, in the excerpt quoted from the Concurring Opinion the lack or unlawful intent was only one of the relevant facts considered in evaluating the alleged restraint. Even in the short excerpt quoted, Judge Leventhal cites at least three other reasons for concluding that no unreasonable restraint has been shown —that the practice protects the lender, that it avoids wasted effort and that it obviates unnecessary expense to the borrowers. Again, this excerpt provides no support for petitioners' contention that the Court of Appeals was applying some new test under which proof of unlawful intent was required to establish a section 1 violation. Furthermore, if the Concurring Opinion ever left any room for doubt concerning the proper role of intent in evaluating an alleged restraint that doubt was certainly laid to rest by Judge Leventhal's Modification of the Concurring Opinion in which the relevance of intent, whether lawful or unlawful, is described in precisely the same terms as were used by this Court in *Chicago Board of Trade.*

Thus, petitioners' contention that the Court of Appeals decision requires proof of "unlawful purpose" to establish a section 1 civil violation is insupportable. Since the only issue upon which review is sought is premised on that contention, no issue exists upon which review could be granted.

Petitioners have made no effort to satisfy, or even to address, the criteria set forth in Rule 19(b) for use in determining whether review should be granted. In any event, there is certainly no conflict between the Court of Appeals decision and the applicable decisions of this Court. As shown above, the decision is entirely consistent with the Court's decision in *Gypsum* [14] and with

[14] See p. 8 n.12.

the *Chicago Board of Trade* standard [15] which is expressly adopted in the excerpt from *National Society of Professional Engineers* v. *United States,* 435 U.S. 679 (1978) that is quoated in the petition at page 14.

Similarly, there is no conflict with other Court of Appeals decisions on the same subject and none is even suggested. The only other Court of Appeals decision involving similar issues is *Forrest* v. *Capital Building & Loan Ass'n.,* 504 F.2d 891 (5th Cir. 1974), which is not only consistent with the decision of the Court of Appeals decision in this case but which was cited and relied upon in the decision. The unsuccessful appellants in *Forrest* also filed a petition for a writ of certiorari, and the petition was denied. 421 U.S. 978 (1975).

The other criteria set forth in Rule 19(b) are inapplicable, and, since the petitioners have not satisfied any of the criteria, the petition should be denied.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit be denied.

Respectfully submitted,

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November 24, 1978

[15] See discussion at pp. 8-10 herein.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1977

No. 76-1455

Civil 76-73

DANIEL C. FOSTER, ET AL., *Appellants,*

v.

MARYLAND STATE SAVINGS AND LOAN ASSOCIATION

Before: LEVENTHAL, MACKINNON and WILKEY, Circuit Judges

[Filed October 24, 1978]

Order

It is ORDERED, by the Court, *sua sponte,* that the Opinion for the Court, filed by Circuit Judge Wilkey on June 12, 1978, in the above captioned case be, and it hereby is amended by inserting at the end of footnote 25 on page 11, immediately after the citation, and without commencing a new paragraph, the following:

> We do not intend to imply, however, that a practice which is *not otherwise reasonable* may be exempted from the antitrust laws merely because purportedly authorized by a state or federal regulation. "[A] state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." *Parker* v. *Brown,* 317 U.S. 341, 351 (1943); *see also Otter Tail Power Co.* v. *United States,* 410 U.S. 366, 372-74 (1973). We

rely on the cited regulations only as further evidence that the defendant's practice was unmotivated by an anticompetitive purpose.

Per Curiam
For the Court

/s/ George A. Fisher
George A. Fisher
Clerk